Supreme Court, U.S.
FILED
OCT 19 1998
OFFICE OF THE CLERK

No. 98-454

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF CINCINNATI, *et al.*,
Petitioners,

v.

JOHN R. KRUSE, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE SECRETARIES OF STATE OF CONNECTICUT, GEORGIA, MAINE, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, WEST VIRGINIA AND WISCONSIN, THE EXECUTIVE DIRECTOR OF CAMPAIGN SPENDING COMMITTEE OF HAWAII, THE DIRECTOR OF THE REGISTRY OF ELECTION FINANCE OF KENTUCKY, AND THE EXECUTIVE DIRECTOR OF ETHICS COMMISSION OF OKLAHOMA IN SUPPORT OF THE PETITIONERS

Donald B. Verrilli, Jr.*
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

October 19, 1998

**Counsel of Record*

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INTEREST OF AMICI

Amici include the following Secretaries of State: Miles Rapoport of Connecticut, Lewis Massey of Georgia, Dan Gwadosky of Maine, William Galvin of Massachusetts, Joan Growe of Minnesota, Eric Clark of Mississippi, Mike Cooney of Montana, Dean Heller of Nevada, William Gardner of New Hampshire, Stephanie Gonzales of New Mexico, James R. Langevin of Rhode Island, Jim Miles of South Carolina, Riley Darnell of Tennessee, Ken Hechler of West Virginia and Douglas LaFollette of Wisconsin.[1] *Amici* also include: Robert Watada, Executive Director of Campaign Spending Committee of Hawaii, George Russell, Director of Registry of Election Finances of Kentucky, and Marilyn Hughes, Executive Director of Ethics Commission of Oklahoma. In these positions, they serve as chief election officers in their States. They thus have considerable experience with the issues raised in this case, and in particular have witnessed the serious threats that unlimited campaign spending poses to the integrity and health of the political process.

Amici seek review of the Sixth Circuit's decision in this case because they believe this Court should re-evaluate the principles of *Buckley v. Valeo*, 424 U.S. 1 (1976), in light of the practical realities of the campaign finance system that has evolved in this nation in the past quarter century. A number of States and localities have enacted campaign finance regulations similar to the one at issue here, based on their belief that such regulations are necessary to preserve the health of our democratic form of government, and to combat widespread public cynicism about the extent to which office holders and

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1/The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity made a financial contribution to the preparation or submission of this brief.

candidates must focus on the never ending process of garnering contributions, rather than on the process of governing itself. Many more States and localities would doubtless enact legislation similar to that at issue here if the perceived constraints of the *Buckley* decision were removed.

These initiatives respond to practical realities. Office holders and candidates do in fact have to spent ever increasing amounts of time raising funds. Their preoccupation with fundraising does in fact diminish their ability to fulfill their responsibilities as elected officials. Additionally, contribution limits (the only form of campaign finance regulation approved in *Buckley*) are so now routinely circumvented (through a variety of stratagems) that those limitations are no longer effective in preventing both the actuality and appearance of *quid pro quo* corruption of the political process. *Buckley v. Valeo* needs to be reconsidered in light of these practical realities.

STATEMENT

This case involves an ordinance passed by the City of Cincinnati in 1995 limiting overall expenditures for City Council campaigns to $140,000.[2/] The City enacted this limitation to address widespread loss of public confidence in the electoral process and in local government, a loss of confidence brought about by the unlimited campaign spending that characterized City elections. In particular, the City sought to combat the risk of actual *quid pro quo* corruption as well as its appearance, to free office holders from the ever increasing pressures of fundraising made necessary by the absence of

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2/City of Cincinnati Ordinance No. 336-1995, amended by Ordinance No. 9-1997.

limits on overall campaign spending, and for other purposes. The relevant facts related to the City's decision to limit overall campaign spending, and to the justifications for imposing that limitation, are fully set forth in the petition for certiorari and will not be repeated here.

For present purposes, it suffices to note that the City of Cincinnati is not alone in its perception that unlimited campaign spending threatens the health of our democratic institutions. Last year, the State of Vermont enacted campaign spending limits for its state elections, which will take effect in the year 2000. *See* Vt. Stat. Ann. tit. 17, § 2805a. The City of Albuquerque, New Mexico has enacted limitations on campaign spending for local elections. *See* Albuquerque, New Mexico Charter, art. XIII, Election Code § 4. The Supreme Court of Ohio revised its judicial ethics code to limit campaign spending for judicial elections. *See* Supreme Court of Ohio Code of Judicial Conduct, Cannon VII(C)(6). Many other States and localities are contemplating similar restrictions. These state and local initiatives respond to a growing perception that our electoral processes are coming to threaten the health of our democratic institutions.

REASONS FOR GRANTING THE PETITION

The petition for certiorari should be granted because there is a pressing need for re-examination of *Buckley v. Valeo*. That is so for four related reasons. First, campaign spending limitations of the kind at issue in this case can be (and in fact are) justified on the basis of content-neutral reasons that were never considered in *Buckley*, and should be considered by this Court now. Second, the First Amendment standard of review applicable to such content-neutral regulations has been clarified considerably in the decades since *Buckley* was decided, *see Turner Broadcasting System, Inc. v. FCC*, 117 S.

Ct. 1174, 1183, 1186-87 (1997), in ways that cast significant doubt on *Buckley's* method of analysis and ultimate result respecting campaign spending limitations. Third, the Court of Appeals' decision to deny the City any meaningful opportunity to develop a record to support its campaign spending limitations cannot be reconciled with this Court's recent decisions making clear that government is entitled to an opportunity to prove in court that the harms it seeks to address are real, and not merely speculative. Fourth, the *Buckley* decision stands as a significant barrier to reforms of the political process that are widely perceived as necessary to the health of our democratic system of government at the state and local (as well as the federal) level.

1. The campaign spending limitation struck down by the Sixth Circuit in this case serves important public interests that differ in critical respects from those evaluated by the Court in *Buckley*. The Sixth Circuit focused most of its analysis on only one of the justifications offered by the City; the need to combat risks of actual and perceived corruption of the political process. We believe the Sixth Circuit erred by assuming that *Buckley* foreclosed this justification, notwithstanding that the City had put forward a far more compelling factual showing in support of this justification than was available to the *Buckley* Court. *See* page 9, *infra*. But the City also advanced other justifications that were never considered by the *Buckley* court. Most importantly, the City enacted overall spending limitations in order to free council members and candidates from the enormously time consuming burden of perpetual fund raising that the prior system of unlimited campaign expenditures made necessary. That is a compelling interest in its own right, and provides an independent justification for campaign spending limitations.

a. The interest asserted by the City in defense of its campaign spending limits is, in essence, an interest in the quality of representation. The City seeks to eliminate the enormous burden of raising large campaign war chests. That this burden exists, and has come to dominate the professional lives of office holders and candidates is not open to serious question. *See* Petition for Certiorari at 11-14. *See generally* Vincent A. Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281-82 & nn.1-3 (1994). The problem the Ordinance at issue here addresses is that the incessant demands of fund raising effectively prevent elected representatives from fulfilling their professional duties. Elected officials spend so much of their time raising campaign funds that they do not have enough time remaining to master issues, communicate with constituents, hold hearings, or perform other essential parts of their job. This interest is not merely important; it is of constitutional dimension in its own right.

This problem is the direct result of the absence of overall limits on campaign spending, and will be addressed by such limits. Moreover, the fundraising burden on candidates is an outgrowth of the campaign finance regime that *Buckley* generated. By upholding limits on campaign contributions and coordinated expenditures while striking down campaign spending limits, the *Buckley* court established a legal structure that puts States and localities to an unpalatable choice. If they address the risks of corruption by imposing contribution limits, they force officeholders and candidates to spend most of their time raising campaign funds (because the huge aggregate funds needed to campaign effectively may only be raised in small increments). If they decide to free office holders and candidates from this burden by eliminating contribution limits,

they must endure the risk of actual and perceived corruption of the electoral process.

b. The Sixth Circuit believed that *Buckley* foreclosed consideration of this justification for overall spending limits. That is not correct. The justifications considered and rejected by the *Buckley* Court have almost nothing to do with the problem of how candidates spend their time. The *Buckley* Court rejected the argument that Congress could decide that campaign spending had become wasteful or excessive. The *Buckley* Court also held that the record presented in that case did not support the argument that overall spending limits were needed as an additional means to promote compliance with contribution limits. 424 U.S. at 56. The *Buckley* Court simply did not consider the candidate time-protection rationale the City offers here.

According to the Court of Appeals, that rationale was nevertheless foreclosed because the "need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns." Pet. App. 22a. The court reasoned that "because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money . . . cannot serve as a basis for limiting campaign spending." *Id.* But that puts the cart before the horse. The *question* before the Sixth Circuit was whether the candidate protection rationale provided an alternative basis sufficient to justify overall campaign spending limits. *Buckley* would foreclose that rationale only if *no* rationale was sufficient to justify such restrictions. We do not read *Buckley* as foreclosing any possibility of justifying campaign spending limits. At a minimum, however, the Sixth Circuit's holding makes clear the need for guidance from this Court as to whether such restrictions may be imposed under appropriate circumstances. Otherwise, the Sixth Circuit's ruling will effectively prohibit States and other localities within

the Circuit from enacting campaign spending limits justified on this basis, and will have a serious inhibiting effect outside the Sixth Circuit.

2. Review is also warranted to clarify the appropriate First Amendment standard of review applicable to campaign restrictions like the one at issue here, and to clarify the appropriate scope of factual development in such cases.

a. At the outset, it is important to place this issue in the proper framework. The process of selecting candidates for public office is, of necessity, subject to a significant degree of regulation. At the most basic level, the people of a particular state, like the people of the United States as a whole, make precommitments (such as term limits) that could in some sense be understood as limiting political expression. *See generally U.S. Term Limits, Inc. v. Thorton*, 514 U.S. 779, 837 (1995) ("Over half the States have adopted measures that impose such limits on some offices . . . Term limits, like any other qualifications for office unquestionably restrict the ability of voters to vote for whom they wish [but] may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents"). Additionally, States routinely regulate the conditions under which candidates may appear on the ballot, as well as other features of the electoral process. *See generally Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Rosario v. Rockefeller*, 410 U.S. 752, 761-62 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972). Such laws may, of course, implicate First Amendment values because they may have the effect of limiting the ability of individuals or political parties to express their preferences through balloting. Nevertheless, such laws are typically not subject to strict First Amendment scrutiny, and are usually held to be constitutional because they are

understood to further the paramount interest in ensuring that the democratic process works. Strikingly, even laws regulating the electoral process that directly regulate expression because of its consequences, and are thus subject to strict scrutiny, have been upheld by this Court. *See Burson v. Freeman*, 504 U.S. 191 (1992); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). These decisions recognize that governments generally have more latitude to regulate expressive activity in the electoral process than they might in other settings, because the efficacy and integrity of that process is itself an interest of constitutional dimension.

b. Especially in view of this history, First Amendment challenges to campaign finance laws, like all First Amendment challenges, should be governed by the general principle that is now settled (but was not settled at the time of *Buckley*) that "[t]he government's purpose is the controlling consideration" in ascertaining the appropriate First Amendment standard of review. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Strict scrutiny applies only to "regulations enacted for the purpose of restraining speech on the basis of its content." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). The more lenient requirements of intermediate scrutiny apply "to those cases in which the governmental interest is unrelated to the suppression of free expression," *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quotation omitted), or where the legislation is "justified without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (quotation omitted); *Ward*, 491 U.S. at 791. This Court recently made clear in *Turner Broadcasting System Inc. v. FCC* that intermediate scrutiny is appropriate even to laws that may directly regulate speech activity, if government's justification for doing so is unrelated to the content of the expression limited by the regulation. 117 S. Ct. at 1197-98. Of course, where a restriction is imposed for the purpose of regulating the

communicative effect of expression occurring in the course of a political campaign, strict First Amendment scrutiny is appropriate, and the law may be upheld only if it advances a compelling interest in the least restrictive manner. Where the government's purpose is unrelated to the communicative impact of the expression at issue, however, a more lenient standard is appropriate.

c. That is plainly the case here. One of the principal rationales offered by the City for its campaign spending limitation is the need to reduce the amount of time elected officials must spend amassing campaign war chests. This justification in no way depends on the communicative impact of any expression that might be curtailed as a result of the law, and is not based in any way on government hostility to the messages expressed by city council candidates. Rather, the Ordinance seeks to limit harmful effects that occur when office holders and candidates must devote enormous amounts of their time to soliciting contributions. In other words, the Ordinance aims at activity related to the generation of income which might then be used to fund speech, and does so not out of any hostility to the speech but out of concern over the effects of the income-generating activity.

The Sixth Circuit, however, applied a standard even stricter than strict scrutiny. It held campaign spending limits could not be justified on any basis -- no matter how compelling. That ruling would appear to be out of accord with this Court's jurisprudence respecting the First Amendment standard of review applicable to content neutral laws. Review is thus warranted to clarify the First Amendment standard of review applicable to government efforts to limit campaign spending in order to achieve goals unrelated to the suppression of expression.

3. Of equal importance, this Court has in recent years substantially clarified the role of district court factual development in resolving First Amendment disputes of the kind at issue here. Even content-neutral justifications such as the one at issue in this case must be supported by something more than speculation. *See Colorado Republican Federal Campaign Committee v. FEC*, 578 U. S. 604, 618 (1996) ("When the government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured") (quotation omitted). By the same token, government must be given the opportunity to meet its burden of proving that the hams it recites are real and will be redressed by the regulation in question. And government may defend a regulation by making a record in court sufficient to support the regulation, even if the judicially developed facts were not considered by the relevant authorities when the Act was passed. That much is now clear from this Court's decisions in the *Turner Broadcasting* cases. In the first *Turner Broadcasting* decision, the Court accepted the theoretical importance of the justification offered by the United States for requiring cable operators to carry the signals of broadcast channels, but remanded to the district court to allow the government to develop a factual record sufficient to show that the harms it recited were real and would be redressed by the law in question. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 668 (1994). When the case returned to this Court, the record developed in the district court provided the principal basis for the Court's conclusion that the government had carried its burden of justifying the must-carry law. Indeed, the Court made clear that the additional evidence on remand was admissible to "support[] the reasonableness of Congress' predictive judgment" that must-carry was necessary. 117 S. Ct. at 1193; *see also id.* at 1191 ("[t]he reasonableness of Congress' conclusion was borne out by the evidence on

remand"). Much of that evidence was not before Congress. Indeed much of it involved actions occurring *after* Congress enacted the law in question.

These principles should apply with full force in the context of adjudicating challenges to campaign finance regulations. Indeed, in *Buckley* itself and in this Court's more recent decision in *Colorado Republican Federal Campaign Committee*, the Court's rejection of the "anti-corruption" rationale for spending limitations at issue in those cases was premised in significant part on the absence of "record evidence or legislative findings" supporting the rationale. *Colorado Republican Federal Campaign Committee*, 518 U.S. at 618. It is all the more important to permit development of a full factual record with respect to the justifications for campaign spending limits that were not even considered by the *Buckley* court.

4. Review is also warranted because readings of *Buckley* such as the one at issue here will stifle reform that is widely perceived as necessary by state and local governments across the nation.

Although *amici* believe *Buckley* should be overruled (or at least significantly modified), it is enough for present purposes to show that the decision is thwarting reforms thought to be necessary at the state and local level. This is an issue of paramount importance. If state and local governments are to be prevented from pursuing campaign finance regulation they believe to be strongly in the public interest -- regulation made necessary by what is widely perceived to be the failure of the regime put in place by the *Buckley* decision -- that should be on the basis of a considered evaluation of First Amendment principles in the context of the practical realities of our present system of electoral campaign finance. Those realities largely

did not exist when *Buckley* was decided, and this Court did not consider them.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Donald B. Verrilli, Jr.*
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

October 19, 1998